88-1507

No. _____

Supreme Court, U.S.
FILED
MAR 15 1989
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ELAINE MOTT,

Petitioner,

v.

GERALD C. KERNS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March 15, 1989

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QUESTION PRESENTED

The Court of Appeals for the Sixth Circuit affirmed the *sua sponte* dismissal of Petitioner's race-based civil rights lawsuit for a failure to prosecute her case, although Petitioner, while unrepresented, wrote a letter to the trial judge stating "that I would like to pursue this lawsuit with an attorney I can work with and have good rapport" and had her new attorney file an appearance by the court-ordered date, file discovery and motion papers, and participate in mediation all within the two months immediately before Petitioner's dismissal for failure to prosecute. The question presented is:

WHETHER A PLAINTIFF'S CIVIL RIGHTS LAWSUIT CAN BE DISMISSED *SUA SPONTE* FOR FAILURE TO PROSECUTE, DESPITE PLAINTIFF'S HANDWRITTEN LETTER TO THE TRIAL JUDGE AND HER ATTORNEY'S COMPLIANCE WITH THE COURT'S ORDERS AND ACTIVE PROSECUTION OF THE CASE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ——

ELAINE MOTT,

Petitioner,

v.

GERALD C. KERNS, *et al.*,[1]

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Elaine Mott respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 10, 1988.

OPINIONS BELOW

The unpublished *per curiam* opinion of the Court of Appeals (dated November 10, 1988) is Appendix A hereto. The order of dismissal of the District Court for

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[1] Respondents are Gerald C. Kerns, individually and in his official capacity as a State Policeman for the State of Michigan; Michael Stamm, individually and in his official capacity as a State Policeman for the State of Michigan; Gerald L. Hough, Director of the State Police for the State of Michigan; Richard Doe, individually and in his capacity as Shift Supervisor of the State Police for the State of Michigan; and the Michigan State Police, jointly and severally.

the Eastern District of Michigan (dated October 28, 1987) from which that appeal was taken is Appendix B. Because petitioner Elaine Mott took two appeals to the Court of Appeals (prevailing in the first but not in the second), the first *per curiam* opinion of the Court of Appeals (dated August 6, 1987) is included as Appendix C and the first judgment of dismissal by the District Court (dated January 20, 1987) is included as Appendix D.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Sixth Circuit were entered on November 10, 1988. A timely petition for rehearing *en banc* was denied on December 30, 1988, and a copy of such order is Appendix E hereto. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

I. Nature of the Case

Petitioner nurse and her doctor husband were terrorized on an interstate highway near Paw Paw, Michigan, by Michigan State Police troopers who unlawfully arrested and jailed them. A lawyer selected by petitioner's husband filed a race-based civil rights action for petitioner and her husband. Thereafter, petitioner and her husband were involved in bitter divorce proceedings and the lawyer withdrew, leaving petitioner to represent herself *in pro per.*

Pending her selection of a new attorney, the petitioner sent a handwritten letter to the court advising "that I would like to pursue this lawsuit with an attorney I can work with and have good rapport." Subsequently, the trial judge was elevated to the Sixth Circuit and the successor judge ordered petitioner to have new counsel by date certain.

Petitioner's new counsel filed an appearance by the court-ordered date and actively participated in pretrial motions, discovery, and mediation. Nonetheless, the successor trial judge *sua sponte* dismissed petitioner's complaint for failure to prosecute because she "could not establish active or interested participation in the lawsuit," and the Sixth Circuit affirmed.

II. Statement of Relevant Facts

Petitioner Elaine Mott, R.N., and her husband William Mott, M.D., a black couple, were returning home to Ypsilanti, Michigan (the site of Dr. Mott's medical practice), late Sunday evening in June of 1983 from a weekend spent with their grown children in Gary, Indiana. After midnight, as they drove along Interstate 94 past the Paw Paw, Michigan, State Police Post, where troopers have circulated "Runnin' Nigger" firearms targets and other racist paraphernalia, a police prowl car pulled onto the Interstate alongside the Motts' van and shined a spotlight into Dr. Mott's face.

Once the troopers saw that Dr. Mott was black, and without probable cause, they pulled the Motts' van to the Interstate shoulder, ordered Dr. Mott out of the van, frisked him, and crawled into the van and searched through the Motts' closed luggage. When one of the troopers discovered a handgun packed by one of the Mott children into a zippered case in the back of the van (a handgun that Dr. Mott had been lawfully entitled to carry as a county coroner but the registration for which had expired), the other officer ordered Mrs. Mott out of

the van, drew his gun, placed its barrel against her temple, handcuffed her, and frisked her. Back at the police post, both Dr. and Mrs. Mott were disrobed, provided with prison garb, and jailed with other inmates in common, dirty cells.

The following morning, the Motts were displayed in the busy courtroom, still dressed in prison garb. Handgun charges against the Motts were subsequently dismissed because of the troopers' violation of the Motts' constitutional rights in illegally searching the Motts' van.

Detroit attorney Alan Hunt obtained the criminal file and transcripts of the criminal hearings and filed a civil rights complaint under 42 USC § 1983 on behalf of Dr. and Mrs. Mott. The two troopers who had terrorized the Motts were defendants, either individually or together, in at least *seven* such suits.

Elaine Mott filed for divorce in July of 1984, and attorney Hunt eventually withdrew from representing the Motts in the civil rights suit because of the bitterness of the Motts' divorce. At the time of Hunt's withdrawal, and in order to protect her rights in this case, Mrs. Mott wrote presiding Judge Ralph B. Guy, Jr., a long letter describing her divorce and problems with counsel. Her September 10, 1985 letter is reproduced in its entirety as Appendix F, and concluded:

> I would like to take this opportunity while closing this letter, to inform the courts that I would like to pursue this lawsuit with an attorney that I can work with and have good rapport, other than [her husband's divorce attorney] Sherman Sharpe. [24a]

Mrs. Mott also sent her divorce attorney to the hearing on Hunt's withdrawal, and at that hearing her attorney stated,

> And Mrs. Mott does want to pursue this action. She does feel she's had substantive rights violated. And she is agreeable to pursuing it with Dr. Mott,

> but she has to have a lawyer * * * who will represent both their interests, and not just a lawyer who's going to represent Dr. Mott. [Hearing Transcript at 22.]

Shortly thereafter Judge Guy was elevated to the Sixth Circuit, and the case was reassigned to newly-appointed Judge Barbara K. Hackett. A status conference was held on October 2, 1986 and Judge Hackett issued an amended scheduling order which directed "Wife's attorney to enter appearance by 10-6-86." Elaine Mott's attorney entered his appearance by the directed date and thereafter actively pursued her case. Among other things, he scheduled the depositions of the two defendant troopers, stipulated to defendants' requested extension of discovery cut-off dates, responded in opposition to defendants' motion for protective order, moved to compel interrogatory answers from defendants, drafted and filed a mediation summary and attended and participated in the mediation hearing (where Elaine Mott's case was evaluated at $62,500), and agreed to produce Elaine Mott for her deposition at a later scheduled date. All of the foregoing action took place in the two months prior to Elaine Mott's dismissal described below.

III. Proceedings Below

On November 26, 1986, Judge Hackett *sua sponte* and without a hearing dismissed Elaine Mott's case on the basis that she had never been properly named a party. Elaine Mott promptly appealed such dismissal to the Sixth Circuit. On appeal, the Sixth Circuit puzzled about the reason for Elaine Mott's dismissal ("it is difficult to tell precisely the exact basis for the district court's decision," Appendix C: *Per Curiam* Opinion at 13a), found that dismissal was too harsh a sanction if it was for failure to prosecute, and reversed and remanded for a hearing to

determine if Elaine Mott had, in fact, intended to authorize or ratify the filing of the lawsuit:

> In light of these considerations and the circumstances in this case, we hold that the district court's dismissal with prejudice of Mrs. Mott as a party without notice and an opportunity to be heard violates due process. Even if plaintiff deserved a sanction for failure to prosecute, final dismissal was not warranted under the circumstances. Upon remand the district court should give adequate consideration to plaintiff's claim that she ratified attorney Hunt's representation. [Appendix C: *Per Curiam* Opinion at 13a.]

On remand, Judge Hackett held a show cause hearing to consider the subject of Elaine Mott's dismissal. At that hearing, Judge Hackett found that Elaine Mott had intended to go forward with the lawsuit (the determination which the Sixth Circuit had commanded the district court to make) but decided to consider again whether Elaine Mott had failed to prosecute her lawsuit (an issue which the Sixth Circuit had already ruled did not warrant Elaine Mott's dismissal). When Elaine Mott's counsel called Judge Hackett's attention to the letter Elaine Mott had written to Judge Guy more than a year before her dismissal, specifically indicating her desire to go forward with the lawsuit, Judge Hackett stated,

> "Okay. One moment please. The letter certainly evidences her intent to go forward with this lawsuit, which has not been my concern. It's what, in fact, did she do? So please continue, if you have other questions for her based on what I asked. Anything? [Hearing Transcript at 31.]

Judge Hackett then dismissed Elaine Mott once again because

> she could not establish active or interested participation in the litigation until after the statute of limi-

> ations had run on her claim.[2] * * * Alternatively, she was dismissed because she failed to prosecute her claim or follow the court's orders pertaining to the case, thereby seriously prejudicing the defendants. [Appendix B: Order of Dismissal at 6a.]

Judge Hackett did not specify what order Elaine Mott had failed to follow or what prejudice the defendants had been caused.[3] In fact, Elaine Mott's counsel had followed Judge Hackett's order to enter an appearance and proceed to mediation immediately before Elaine Mott's first dismissal, and, far from claiming serious prejudice, the defendants had just answered Elaine Mott's interrogatories, scheduled her deposition, and sought and obtained her stipulation to extend discovery deadlines. The Sixth Circuit affirmed the district court because Elaine Mott " 'could not establish active or interested participation in the litigation' " (quoting the district court) and had "failed to actively and timely prosecute her claim." (Appendix A: *Per Curiam* Opinion at 3a.)

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[2] The statute of limitations does not bar Elaine Mott's claim, because both her complaint (August 28, 1984) and her letter to the Court showing her intent to go forward (September 10, 1985) were filed within three years of the date of defendants' unconstitutional intimidation and jailing of Elaine Mott (June 19, 1983). Mich. Comp. Laws Ann. § 600.5805(8) (West 1987). The Sixth Circuit correctly divined that the issue presented by the district court's dismissal was the nature of Elaine Mott's participation.

[3] The defendants never claimed prejudice, interposed no statute of limitations defense, asserted no objection to petitioner proceeding with the case, and made no motion to dismiss for failure to prosecute.

REASONS FOR GRANTING THE WRIT

BY AFFIRMING THE DISMISSAL FOR FAILURE TO PROSECUTE UNDER THE CIRCUMSTANCES OF THIS CASE, THE SIXTH CIRCUIT'S DECISION SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO THREATEN THE PROCEDURAL RIGHTS OF EVERY LITIGANT IN THIS CIRCUIT.

The inequity of dismissal is so great on these peculiar facts that one has to wonder how the case has gotten this far and what the implications will be for civil rights litigants if the decisions stand uncorrected. An order so significant as the dismissal of a lawsuit which would curtail race discrimination by armed State agents must conform to accepted standards if there is to be procedural fairness and substantial justice. U.S. Const. amend. V. The universal standard in dismissing a case for failure to prosecute is that there must be a showing of willfulness, bad faith, or fault.[4] *See Link* v. *Wabash R. Co.*, 370 US 626, 633 (1962) ("deliberately proceeding in dilatory fashion") ("unexcused conduct"); *Goforth* v. *Owens*, 766 F2d 1533 (11th Cir. 1985) (clear record of delay, willful contempt, and lesser sanctions will not suffice); *Patton* v. *Aerojet Ordnance Co.*, 765 F2d 604, 607 (6th Cir. 1985) ("willfulness, bad faith, or fault"); *Carter* v. *City of Memphis*, 636 F2d 159, 161 (6th Cir. 1980) clear record of delay or contumacious misconduct); *Hildebrand* v. *Honeywell, Inc.*, 622 F2d 179 (4th Cir. 1980) (clear record of delay or willful contempt and finding that lesser sanctions will not suffice).

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[4] A lenient standard for dismissal is especially appropriate where (as for a time in this case) the plaintiff has no attorney. Indeed, judicial indulgence in earnest, though erring, *pro per* representation is a venerated tradition. *See Gideon* v. *Wainwright*, 370 U.S. 908 (1962) (case transferred to appellate docket pursuant to "petition for writ of certiorari").

This case was pending for two years, not an unusually long delay but one which was caused by the elevation of Judge Guy to the Sixth Circuit. Judge Hackett then held a status conference to get the case ready for trial, at which she ordered Elaine Mott's attorney to file an appearance. Elaine Mott's attorney immediately filed that appearance and for the next two months prosecuted the case with depositions, motions, responses, stipulated orders, and mediation, right up to the moment of Elaine Mott's extraordinary dismissal. On this record, the district court could articulate no willfulness, bad faith, or fault by Elaine Mott at all, no less enough to justify her dismissal under the standard used by this and other courts. To the contrary, the district court found good cause for any neglect by concluding that Elaine Mott's "conduct and failure to act in this matter is best explained by the fact that the Motts experienced a bitter divorce shortly after the incident in this complaint." (Appendix B: Order of Dismissal at 6a.)

In carrying out the dismissal, the district court did more than merely ignore its own orders. The district court also ignored an order of the appellate court [5] and flouted the usual practice and accepted procedural standard. Defendants had not moved for an order compelling

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[5] The district court's decision after remand was directly contrary to what Eliane Mott's first appeal had established as the law of the case, i.e., that dismissal for failure to prosecute was too harsh a sanction and "not warranted under the circumstances." *See Cascade Nat. Gas Corp.* v. *El Paso Nat. Gas Co.*, 386 U.S. 129, 142 (1967) (where the district court "does precisely * * * the opposite of what [the appellate] opinion and mandate commanded," the appellate court should reverse, remand, and order the case reassigned to a different district judge); *United States* v. *E.I. Du Pont de Nemours & Co.*, 366 U.S. 316 (1961) (federal appellate court has plenary power to determine whether its ruling "was scrupulously and fully carried out"); *United States* v. *Parke Davis Co.*, 365 U.S. 125 (1961) (failure to follow appellate ruling mandates reversal and entry of judgment for appellant).

discovery or for sanctions based on Elaine Mott's failure to prosecute. Elaine Mott disobeyed no order of the district court. Her dismissal was sudden, not forewarned, and came at a time when her counsel was very actively pursuing her rights. Plainly, up until the moment of Elaine Mott's dismissal both the district court and defendants gave Elaine Mott and her counsel every indication that she was properly a part of the proceedings.

What standard, then, did the lowers courts use to uphold this rash decision? Elaine Mott was dismissed not for willfulness, bad faith, or fault, but because she could not "establish active or interested participation" in the litigation. No court (state or federal) has defined what constitutes "active" participation or how a party who is represented by counsel is to appear "interested" in the litigation.[6] To the contrary, Elaine Mott was entitled to—and did—rely on the efforts of her counsel to prosecute her claim through interrogatories, depositions, motions, and mediation, without regard to how adequately she expressed her "interest." Moreover, it is unfair to require a litigant to show constant activity and interest, particularly when (as in this case) the matter is reassigned from one judge to another, resulting in a trial date nearly two-and-a-half years after the complaint is filed. This novel and unreasonable standard is bad law, the best evidence of which is that it was used to deprive this litigant of any semblance of procedural justice. There will be no procedural fairness for others in this district court and this circuit if that standard supplants the usual one in other cases. If ever there was a case deserving of an exercise of this Court's supervisory power, Sup. Ct. R. 17.1(a), then this is such a case.

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[6] *See* L. Fuller, *Legal Fictions* 23 (1967) ("[f]or every legal word that has been able to disencumber itself of its burden of extralegal connotation, there are ten words that carry with them into the law a mass of nonjuristic associations").

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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March 15, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-2112

WILLIAM H. MOTT,
Plaintiff,

ELAINE MOTT,
Plaintiff-Appellant,

v.

GERALD C. KERNS, individually and in his official capacity as a state policeman for the State of Michigan; MICHAEL STAMM, individually and in his official capacity as a state policeman for the State of Michigan; GERALD L. HOUGH, Director of the State Police for the State of Michigan; RICHARD DOE, individually and in his official capacity as shift Supervisor of the State Police for the State of Michigan; and MICHIGAN STATE POLICE, jointly and severally,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan

[Filed Nov. 10, 1988]

BEFORE: JONES and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Plaintiff-appellant, Elaine Mott, appeals from the district court's order which dismissed her civil rights action brought pursuant to 42 U.S.C. § 1983 (1982). For the following reasons, we affirm.

I.

Elaine Mott and her husband, William Mott, filed a section 1983 action against the above-named defendants in the United States District Court for the Eastern District of Michigan in August of 1984. While the substance of the Motts's allegations is not relevant to this appeal, they essentially allege that the defendants illegally stopped and searched their vehicle and falsely imprisoned them.

Mr. and Mrs. Mott divorced in December of 1984. Approximately nine months later, the Motts's attorney withdrew from the case. Although another attorney filed an appearance on behalf of Mr. Mott in April of 1986, Mrs. Mott's new attorney did not file an appearance until October of 1986. Meanwhile, in June of 1986, the three-year statute of limitations for this section 1983 action expired.

On January 20, 1987, the district court dismissed Mrs. Mott from the case reasoning that (1) she was never properly named as a party because she failed to ratify the lawsuit and (2) that she failed to actively prosecute the case. However, on appeal, this court found that the *sua sponte* dismissal of Mrs. Mott for failure to prosecute was too harsh of a sanction given the circumstances in this case. In addition, we found that Mrs. Mott was entitled to a hearing before she was dismissed as a party. Thus, we remanded the case to the district court for a hearing to determine whether Mrs. Mott was a proper party by virtue of having ratified the actions of the attorney who filed the original suit. *Mott v. Kerns*, 825 F.2d 411 (1987).

After conducting an exhaustive hearing on remand, the district court found that Mrs. Mott did not establish active or interested participation in the lawsuit until after the applicable statute of limitations had run. The court also found that her failure to timely prosecute the claim had seriously prejudiced the defendants. Therefore, the district court again dismissed Mrs. Mott as a plaintiff and she again appealed her dismissal to this court.

II.

We must affirm a district court's order to dismiss a party unless there is a clear showing that the district court abused its discretion under Fed. R. Civ. P. 41(b). *Guzowski v. Hartman*, 849 F.2d 252, 258 (6th Cir. 1988). On remand in the instant action, the district court provided Mrs. Mott with an opportunity to show that she intended to be an active participant in this action. After reviewing all of the evidence, however, the district court found that Mrs. Mott "could not establish active or interested participation in the litigation until after the statute of limitations had run on her claim" and also that "she failed to prosecute her claim." J. App. at 288. Under these circumstances, the court determined that the sanction of dismissal was warranted.

Although the dismissal of a party should occur only in circumstances in which the party—rather than the party's attorney—fails to prosecute a claim, *Carter v. City of Memphis, Tennessee*, 636 F.2d 159, 161 (6th Cir. 1980), we find that the district court did not abuse its discretion in dismissing Mrs. Mott from this civil rights action. Although we originally remanded this case to the district court to determine whether Mrs. Mott ratified the actions of the attorney who originally filed the case, the evidence presented to the district court on remand clearly indicates that Mrs. Mott failed to actively and timely prosecute her claim. Therefore, regardless of whether she ratified this lawsuit, we find that the district court did not abuse its discretion in dismissing Mrs.

Mott's claim for her failure to prosecute it. *Cf. Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985) ("A decision below must be affirmed if correct for any reason, including a reason not considered by the lower court.")

III.

For the above-stated reasons, we hereby AFFIRM the district court's order.

Issued as Mandate: January 17, 1989

Costs: None

A TRUE COPY

ATTEST:

LEONARD GREEN
Clerk

By /s/ Tom [Illegible]
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 84-CV-4180-DT

HON. BARBARA K. HACKETT

WILLIAM HUGH MOTT and ELAINE MOTT,
Plaintiffs,

vs.

GERALD C. KERNS, individually and in his official capacity as a state policeman for the State of Michigan; MICHAEL STAMM, individually and in his official capacity as a state policeman for the State of Michigan; GERALD L. HOUGH, Director of the State Police for the State of Michigan; RICHARD DOE, individually and in his official capacity as Shift Supervisor of State Police for the State of Michigan; and MICHIGAN STATE POLICE, jointly and severally,

Defendants.

ORDER OF DISMISSAL WITH PREJUDICE
AS TO PLAINTIFF ELAINE MOTT

At a session of said court held in the city of Detroit, Michigan, on Oct. 28, 1987.

PRESENT: HONORABLE BARBARA K. HACKETT
United States District Judge

The court held a hearing on September 14, 1987, to determine Elaine Mott's role and/or participation in this case.

After hearing the testimony of all witnesses relevant to the matter of Elaine Mott, including Elaine Mott whom the court did not find credible, her current attorney John Bredell, her former attorney Alan Hunt, William Mott, Sr., and Sherman Sharpe, and after reading the written briefs of the parties and after hearing the oral arguments of the parties, this court issued its opinion from the bench. Elaine Mott's conduct and failure to act in this matter is best explained by the fact that the Motts experienced a bitter divorce shortly after the incident in this complaint.

The court's oral opinion, which is hereby adopted and incorporated by reference into this Order of Dismissal, dismissed Elaine Mott from the litigation because, *inter alia*, she could not establish active or interested participation in the litigation until after the statute of limitations had run on her claim. The written records in this case evidences the fact that Elaine Mott specifically disavowed any authority by any one to file a complaint in her behalf until after the statute of limitations had run. Alternatively, she was dismissed because she failed to prosecute her claim or follow the court's orders pertaining to the case, thereby seriously prejudicing the defendants. Rule 20, Local Rules the United States District Court for the Eastern District of Michigan.

For the above reasons, IT IS ORDERED that Elaine Mott is hereby dismissed from this case with prejudice.

/s/ Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Detroit, Michigan

Monday, September 14, 1987

10:30 o'clock a.m.

EXCERPT

* * * *

THE COURT: Thank you, Dr. Mott.

The problem I have in this case is I have the testimony of lawyers as to what they thought their client wanted them to do, what they thought their client might request them to do, and what they believed would be in their client's best interest.

On the other hand, I have a plaintiff in this case who, by her own testimony, has indicated that she was at times inclined, if you will, to be in this lawsuit and other times out of this lawsuit.

I'll state on this record that I have a real problem with credibility of Elaine Mott. She is a well informed individual who well knew what was happening in this lawsuit. When she wanted to know she found out.

I factually determine that, if it was in her husband's best interest, everything in this record would suggest that she wanted no part of this. She had an attorney who was keeping her advised.

On this record she did not authorize her attorney, Mr. Bredell, to go forward in her behalf until well after the statute had run.

I find that the attorney, Mr. Bredell, could do only what his client would authorize him to do. He filed his appearance when she authorized him to do so. There was no retainer, no agreement as to paying him, until well after this lawsuit—rather, the statute in this lawsuit had run.

Mr. Hunt's role was one where he assumed, because the parties were married, that it would be in Mr. Mott's best interest and Elaine Mott's that a lawsuit be filed in

behalf of both of them. At the time he filed it the allegations in the complaint are what he thought they should be, based on his investigation of the criminal file. He didn't speak with her. He didn't discuss what her damages would be, what an appropriate claim might be but rather, if you will, protected what he thought was the record at the time. When the real facts came to his attention he properly removed himself from the case.

Mrs. Mott has been on notice as to the pendency of this lawsuit for a long time. There has been no way that this Court could contact her. The suggestion there was possibly a return address on the letter to Judge Guy, I must disregard at this time.

There was frequent contact in the sense that she was on notice that this matter would require some effort and attention on her part, if she chose to go forward.

From the facts on this record, as I have them, she did not formally authorize her attorneys to do anything until late in the fall of '86, well after the statute had run.

The attorneys in this case I recognize are in a very difficult situation. Nothing that I'm saying is to be construed as suggesting that they did anything more than they were authorized to do.

You cannot represent a client who doesn't authorize you to do so. You can't file papers without authority to do so. You can well imagine what the situation would be if all of us were called upon to answer to complaints filed by persons who had no authority to file them. This is not critical of Mr. Hunt. He acted based on facts as he assumed them to be true at the time.

Because of the substantial penalty to the defendant, not withstanding it's a harsh remedy, this Court will stand on its original findings that Mrs. Mott has not been in this lawsuit, has had no formal role in this lawsuit, and did not choose to participate in this lawsuit until well after the statute had run. The filing of a lawsuit by an attorney who assumed he had her authority to do so does not toll anything.

Mrs. Mott, when called upon to participate, refused to do so. Not neglected to do so, but rather refused to do so. Nor did she take sufficient action to preserve her role in this until discovery was closed, one or two trial dates had passed, and it came to her attention possibly because of the matter in mediation that she might realize some dollars in this case. Not withstanding—not wanting her husband to prevail, it would seem that this record supports the finding that she then chose to go forward in her own behalf, but she did so well beyond the time the statute would allow her to do so.

For this Court to read into this record more than I can find in these facts would not be appropriate. I cannot, nor can the parties confer jurisdiction. The statutory limits are fixed by law.

Having carefully reviewed this—and I assure you I read this again before I came on the bench—having listened carefully to you for almost three hours, the record is now before me, and weighing the credibility of the parties I must find that Mrs. Mott is not properly in this lawsuit.

The case will go forward as William Mott, plaintiff, and an early trial date will be assigned.

MR. BREDELL: May we submit a 54 (b)(C) for the Court's signature?

THE COURT: You may.

MR. SHARPE: Thank you, Your Honor.

THE COURT: You realize, counsel, it's factual credibility, though you may try, but I cannot delay this just indefinitely. This is truly prejudicing the parties in this case.

Thank you, all.

MR. BREDELL: Thank you.

* * * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-1151

WILLIAM MOTT,
Plaintiff,

ELAINE MOTT,
Plaintiff-Appellant,

v.

GERALD C. KERNS, individually and in his official capacity as a state policeman for the State of Michigan; MICHAEL STAMM, individually and in his official capacity as a state policeman for the State of Michigan; GERALD L. HOUGH, Director of the State Police for the State of Michigan; RICHARD DOE, individually and in his official capacity as Shift Supervisor of State Police for the State of Michigan; and MICHIGAN STATE POLICE, Jointly and Severally,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan

Decided and Filed Aug. 6, 1987

BEFORE: MERRITT, MARTIN, and WELLFORD, Circuit Judges.

PER CURIAM. Plaintiff, Elaine Mott, brings this appeal from a judgment of dismissal by the district court. The complaint, listing both Motts as party-plaintiffs, was filed on September 7, 1984 by attorney Alan D. Hunt and requests relief under 42 U.S.C. § 1983 due to the alleged racially discriminatory arrest and treatment of plaintiff and husband after a stop on the highway by Michigan state police officers on June 30, 1983.

Attorney Hunt requested and, on July 31, 1985, was granted withdrawal as counsel based upon an "irreconcilable breakdown in the attorney-client relationship." Reconsideration of the motion was granted with Dr. William Mott asserting that Hunt never communicated with Elaine Mott prior to or during the pendency of the action. Hunt averred that he requested withdrawal due to Dr. Mott's failure to produce Elaine Mott after repeated promises to do so and because Dr. Mott failed to inform him of the Motts' pending divorce action. The matter was referred to Magistrate Virginia Morgan. Elaine Mott and counsel John Bredell attended oral arguments on the motion on September 12, 1985, along with Hunt, Dr. Mott, and his counsel Sherman Sharpe. The magistrate's report and recommendation found that although Hunt had filed a complaint on behalf of both of the Motts, he had been retained by Dr. Mott and had never spoken with Elaine Mott. The district court allowed Hunt to withdraw.

In April, 1986, the case was reassigned to the Honorable Ralph B. Guy, Jr. John Bredell did not file an appearance on behalf of plaintiff until October 6, 1986, subsequent to two pretrial conferences.

On November 26, 1986, Elaine Mott was dismissed without prejudice by the court on the grounds that she was never properly named as a plaintiff. When she requested a final judgment in order to appeal the court's order of dismissal, the court dismissed her claim with prejudice because she was never properly a party, she

had never participated in pretrial conferences, and the statute of limitations had expired. Apparently dismissal was prompted when defendants filed a motion for a protective order to prevent plaintiff from deposing a witness who had previously been deposed by attorney Hunt. At that time, Bredell argued that Hunt had never represented Elaine Mott.

Plaintiff argues that the district court erred in overlooking her ratification of the lawsuit filed by attorney Hunt on her and Dr. Mott's behalf. She cites several instances of participation in the suit as evidence of her ratification and notes that the defendant-appellees, by conducting and responding to discovery with her, recognized her as a rightful participant in the action.

Plaintiff further contends that she was denied her fundamental due process rights by the *sua sponte* order of dismissal without an opportunity to be heard. According to plaintiff, this action by the court resulted in erroneous findings on the controlling facts such as whether Mrs. Mott recognized Hunt as counsel and an erroneous conclusion by reason of the failure to consider ratification or tolling of the statute of limitations. Plaintiff asserts that she was aware of the litigation at or near its inception and that her statements cited by the court were only to the effect that her separate interests had not been adequately represented.

Ratification of an attorney's prior representation has been recognized under certain circumstances. *See* 7A C.J.S. *Attorney & Client* § 188 (1980); *Bethlehem Steel Corp. v. Devers*, 389 F.2d 44, 45-46 (4th Cir. 1968); *Bowles v. Wheeler*, 152 F.2d 34, 40 (9th Cir.), *cert. denied*, 326 U.S. 775 (1945); *Rodgers v. Bromberg*, 53 F.2d 723 (5th Cir. 1931), *cert. denied*, 285 U.S. 542 (1932); *E. F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 387 (S.D. Tex. 1969); *Tudryck v. Mutch*, 320 Mich. 99, 30 N.W.2d 518, 521, *cert. denied*, 334 U.S. 819 (1948); *Presnell v. Board of County Road Commissioners*, 105

Mich. App. 362, 306 N.W.2d 516, 518 (1981); *People v. Burgess*, 17 Mich. App. 119, 169 N.W.2d 122, 124 (1969). In this case, there is evidence that plaintiff may have ratified Hunt's actions as counsel: she attended the September 12, 1985 hearing on Hunt's withdrawal with counsel, and her attorney, Bredell, entered an appearance as counsel for her on October 6, 1986.

Although it is difficult to tell precisely the exact basis for the district court's decision, plaintiff's lack of activity in the case is doubtless a prime consideration. Dismissal of a plaintiff for failure to prosecute is "a harsh sanction which the court should order only in extreme situations showing 'a clear record of delay or contumacious conduct by the plaintiff.'" *Carter v. City of Memphis, Tennessee*, 636 F.2d 159, 161 (6th Cir. 1980), citing *Silas v. Sears, Roebuck & Co.*, 586 F.2d 382, 385 (5th Cir. 1978). The court should use a lesser sanction than dismissal unless "no alternative sanction would protect the integrity of pre-trial procedures." Dismissal is frequently inappropriate where the lack of action is due to the attorney's neglect. For example, the *Carter* court did not approve dismissal despite the fact that plaintiff's attorney failed to discuss settlement, engage in discovery or file appropriate pretrial orders in a timely fashion.

In light of these considerations and the circumstances in this case, we hold that the district court's dismissal with prejudice of Mrs. Mott as a party without notice and an opportunity to be heard violates due process. Even if plaintiff deserved a sanction for failure to prosecute, final dismissal was not warranted under the circumstances. Upon remand the district court should give adequate consideration to plaintiff's claim that she ratified attorney Hunt's representation.

We REVERSE the decision of the district court and REMAND in order for plaintiff to have notice and an opportunity to be heard concerning her proposed dismissal from this action by the court.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 84-CV-74180-DT

HON. BARBARA K. HACKETT

WILLIAM HUGH MOTT AND ELAINE MOTT,
Plaintiffs,

v.

GERALD C. KERNS, individually and in his official capacity as a state policeman for the State of Michigan; MICHAEL STAMM, individually and in his official capacity as a State Policeman for the State of Michigan; GERALD L. HOUGH, Director of the State Police for the State of Michigan; RICHARD DOE, individually and in his official capacity as Shift Supervisor of State Police for the State of Michigan; and MICHIGAN STATE POLICE, Jointly and Severally,

Defendants.

JUDGMENT OF DISMISSAL OF ELAINE MOTT

On November 26, 1986, this court entered an order to dismiss Elaine Mott from this action, having found that she was improperly named as a plaintiff because she had never consulted with the attorney who filed the complaint, and did not see the complaint until over two years after it had been filed. A request for reconsideration of the dismissal (letter dated December 12, 1986) has been previously denied.

Elaine Mott has now submitted a proposed order for final judgment so that she may appeal the order of dis-

missal. She also informally moves for reconsideration, in another letter, dated January 13, 1987, which contends that "[t]o require Elaine Mott to refile a separate lawsuit, and undergo the expense of duplicative discovery seems to be unduly burdensome. . ."

PROCEDURAL HISTORY

This lawsuit was filed on September 7, 1984, by attorney Alan D. Hunt. The complaint alleges that in the early morning of June 30, 1983, Dr. William Mott and Elaine Mott were driving on I-94 in or through Paw Paw, Michigan. It alleges that state police officers Kerns and Stamm shined a light upon the Motts and, after determining that they were black, pulled them over. It further alleges that the Motts were stopped solely because of their race and that any assertion that William Mott had violated a traffic ordinance was simply a pretext.

The complaint further alleges that officer Stamm wrongfully removed William Mott from the vehicle and wrongfully searched the van; and that when a handgun was found inside a zippered purse-like pouch, both William and Elaine Mott were handcuffed and arrested. William Mott claims that the handcuffs were too tight and that the officers refused his request to loosen them. Additionally, he claims that due to damage to his wrists caused by the handcuffs, he can no longer perform surgery. The complaint originally sought relief under 42 U.S.C. § 1983 and several state tort theories. Pendent state claims were dismissed without prejudice on January 9, 1985.

On July 31, 1985, the court granted Alan Hunt's motion to withdraw, which was based on an "irreconcilable breakdown in the attorney-client relationship." No responses to Mr. Hunt's motion had been filed.

On August 12, 1985, William Mott filed a motion for reconsideration of the court's order allowing Mr. Hunt to

withdraw. In his affidavit in support of that motion William Mott stated:

> 7. That on information and belief, at no time prior to filing the Complaint did said attorney Hunt attempt to or in fact communicate with or interview plaintiff, Elaine M. Mott, nor did he provide a copy of the Complaint for her review or verification prior to filing the Complaint or at any time thereafter until the present.
>
> 8. That at no time prior to filing the Complaint and did said attorney Hunt request me to bring plaintiff, Elaine M. Mott, into his office for an interview.

In his response to William Mott's motion, attorney Hunt averred that it was Mr. Mott's failure to inform him of the Motts' pending divorce action, and Mr. Mott's failure to produce Elaine Mott after repeated promises to do so, that prompted his withdrawal.

The motion for reconsideration was referred to Magistrate Virginia Morgan. Oral argument was heard on September 12, 1985. The hearing was attended by Alan Hunt, William Mott, Sherman Sharpe (who appeared as counsel for William Mott), Elaine Mott and John Bredell, (who has recently filed an appearance on behalf of Elaine Mott). At that hearing Mr. Bredell stated on the record that Elaine Mott had no interest in Mr. Hunt's motion to withdraw.

In her report and recommendation the magistrate found that although Hunt had filed a complaint on behalf of both William and Elaine Mott, Hunt had been retained by William Mott and had neither spoken to nor consulted with Elaine Mott prior to initiating the lawsuit. Furthermore, because of the pending divorce, Elaine Mott could not or would not be deposed. The court accepted in part, and rejected in part, the magistrate's report and recommendation and allowed Hunt to

withdraw, but allowed a lien in Hunt's favor on any potential judgment for William Mott.

Sherman Sharpe was thereafter substituted as counsel for William Mott. Although John Bredell did attend the hearing on Alan Hunt's motion to withdraw, he had not filed an appearance on behalf of Elaine Mott at that time.

In April, 1986, this case was reassigned from the docket of Honorable Ralph B. Guy, Jr. to that of this court. On June 6, 1986, a pretrial conference was held. Neither Elaine Mott nor any representative on her behalf attended that conference. On October 2, 1986, another conference was held. Again Elaine Mott was unrepresented. On that occasion the court inquired as to why Mrs. Mott's name appeared in the caption when she was not participating in the lawsuit. Thereafter, on October 6, 1986, John Bredell filed an appearance on behalf of Elaine Mott.

On October 22, 1986, defendants filed a motion for a protective order to prevent Elaine Mott's counsel from deposing a witness whose deposition had previously been taken by Alan Hunt. Defendants argued that duplicative discovery would constitute an undue burden on and hardship for defendants. In response to defendants' motion, Elaine Mott, through her attorney John Bredell, asserted that because Alan Hunt had never represented her, his having taken defendants' depositions should not preclude her from conducting additional depositions. (See Elaine Mott's response to defendant's (sic) motion for protective order, document #50, pages 3 and 4). Her brief also states that: "*Elaine Mott has been represented in this action only since October 6, 1986, when her present attorney filed his Appearance.*" (emphasis supplied)

After a thorough review of the pleadings and orders that preceded the reassignment of the case, this court concluded that Elaine Mott was never properly named as

a plaintiff. Accordingly, in an order dated November 26, 1986, Elaine Mott was dismissed without prejudice and her name deleted from the caption of the case.

PRESENT POSTURE

Elaine Mott, through her attorney John Bredell, now seeks final judgment in order that she may appeal this court's order of dismissal. She also moves for reconsideration of the order of dismissal on the basis that neither the court nor other parties would be prejudiced by allowing her to join in the lawsuit at this late date. She further states that to require her to file a separate lawsuit would result in duplicative discovery and an undue burden.

Elaine Mott's present request ignores several salient facts. She has previously and emphatically disavowed the original complaint filed by Alan Hunt in September, 1984. Moreover, she has insisted that she was not represented in this matter until October 6, 1986. In his notice of appearance her counsel failed to adopt the original complaint. Finally, no subsequent complaint has been filed on her behalf.

This court concludes, therefore, as follows: (1) Elaine Mott cannot now be "renamed" in a lawsuit to which she was never properly a party; (2) any assertion that she was in fact a party, despite the absence of a formal notice of appearance, are negated by her failure and that of her counsel to appear or participate in pretrial conferences; and (3) notwithstanding any potential burden, Elaine Mott cannot now properly file a complaint arising from the events of June 30, 1983, because the applicable statute of limitations has run. MCLA 600.5805. Accordingly,

IT IS ORDERED that Elaine Mott is dismissed with prejudice from this action;

IT IS FURTHER ORDERED that Elaine Mott's name be stricken from the caption in this case; and

IT IS FURTHER ORDERED that Elaine Mott's request for reconsideration of this court's order of dismissal is denied.

/s/ Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Dated: January 20, 1987

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-2112

WILLIAM H. MOTT,
Plaintiff,

ELAINE MOTT,
Plaintiff-Appellant,

v.

GERALD C. KERNS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A STATE POLICEMAN FOR THE STATE OF MICHIGAN, *et al.*,
Defendants-Appellees

ORDER

[Filed Dec. 30, 1988]

BEFORE: JONES and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX F

[Transcription of Petitioner's Handwritten Letter to District Court]

Sept. 10, 1985

4925 N. Kessler Blvd
Indianapolis, Indiana 46208

U.S. District Court
Eastern District of Michigan
Southern Division

To Whom It May Concern, or Honorable Ralph B. Guy, Jr.

On June 20, 1983 I along with my husband William H. Mott M.D. were stopped on 194 East and arrested by State Troopers (Michigan).

We engaged Attorney David Harris to represent us, and subsequently the case was thrown out of the District Court due to illegal search & seizure and false arrest.

Subsequent to the dismissal of this case the filing of a lawsuit against the State of Michigan was discussed with Attorney Harris. Mr. Harris talked with Attorney Alan Hunt in regard to representing us in this matter.

It was in Early December 1983 that my husband mentioned to me that he would contact Mr. Hunt and make arrangements to meet with him in his office.

On Jan 11, 1984 I left Ypsilanti due to physical abuse perpertrated by my husband and went to our Indiana property for refuge for a few days with intent to return.

My huband refused to let me return to Michigan.

Prior to my going to Indiana my husband had not met with Attorney Hunt.

He continued to come to the house in Indiana at intervals form Jan through June of 1984.

On a visit in March 1984 he mentioned Attorney Hunt's name to me and Quote said (I have the best lawyers in Michigan handling this case) Unquote.

He also stated to me Quote (When we have to testify in Michigan we can get separate rooms since we are separated (Unquote). During the Months of Jan through June 1984 Dr. Mott never discussed anything concerning the case other than what I stated above.

On July 2, 1984 I filed for a divorce in Michigan.

Throughout the remainder of 1984 I was told nothing concerning the case, it's progress or otherwise by Dr. Mott.

It wasn't until May of 1985 that Dr. Mott telephoned friends where I am residing at present, trying to locate me.

He told my friends to inform me that I was to come to Michigan and give a deposition in Alan Hunt's office.

He offered to pay all of my expenses if I consented to come.

I immediately called John Bredell my divorce lawyer and explained the situation to him. He in turn contacted attorney Hunt and discussed the situation and informed Mr. Hunt of our marital status and pending divorce action.

This was the first time that Attorney Hunt had any knowledge of Dr Mott and my marital situation.

The first week in August of 1985 my youngest son came to visit me.

Dr Mott sent a letter that he had received from Alan Hunt by my son for me to read.

The letter stated that Attorney Hunt was asking the Courts to release him from the case due to unreconcilable breakdown between client & attorney.

I immediately contacted Mr Bredell & read the letter to him via of phone. I told him I would like to speak with Mr Hunt concerning the letter.

He told me it was alright to contact Mr. Hunt and have him explain to me his decision to be released from the case.

This was the first time that I had had any contact with Mr Hunt via phone or otherwise since the filing of the lawsuit.

He explained to me that he was dropping the case because Dr Mott had concealed information from him concerning our Marital status and would no longer deal with him or trust him.

He explained to me that he could not understand why I never accompanied Dr Mott on any of his visits to the office. He wanted to meet with me to get my side of the story also. He stated he thought he was dealing with us as a couple and Co-Plaintiffs. He stated each time he asked Dr. Mott why I was not present he made some excuse about my not being present and stated You are the Expert, you'll handle that.

Mr Hunt told me that at no time did he have any inclination that Dr Mott and I were not together.

Dr Mott had the opportunity to inform Mr Hunt when he initially met with him about our informal separation.

He also failed to inform him later of the subsequent divorce action.

The only other contact that I had with Alan Hunt following the initial phone call I made to him in August 1985, was on Sept 4, 1985 when he contacted me.

It was at this time that he asked would I sign an affidavit, that he would present to the Courts at a hearing scheduled for Thursday Sept 12 1985.

I would like to take this opportunity while closing this letter, to inform the Courts that I would like to pursue this lawsuit with an attorney that I can work with and have good rapport, other than Sherman Sharpe.

Yours Truly

/s/ Elaine M. Mott